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COMMISSION ON HUMAN RIGHTS

Inter-sessional open-ended working group on a draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography
Second session, 29 January-9 February 1996

COMMENTS ON THE GUIDELINES FOR A POSSIBLE DRAFT OPTIONAL PROTOCOL

Note by the Secretary-General

Addendum

The present document contains comments submitted by the Governments of Comoros, Denmark and the Hashemite Kingdom of Jordan.

Comoros

[Original: French]
[28 October 1995]

1. The Islamic Federal Republic of the Comoros is confronted with the problem of children from poor families being shifted to comparatively well-off families in urban areas, where they are used for domestic work from the age of six. It is a situation that particularly affects little girls. The Government of the Comoros is of the view that this situation should be regarded as a form of the sale of children, agreed to by parents living in circumstances of absolute poverty. The parents are rid of children who are a burden on them in their destitution and they sometimes receive a little food and old clothing from the families that take in the children.

2. The Government is looking into ways and means to remedy this situation in conformity with the Convention on the Rights of the Child, which the Comoros has ratified. The main goals are to cut down poverty and to establish a national council for children. The Government of the Comoros considers that States should pay particular attention to consciousness-raising at the national level and that United Nations agencies, notably UNICEF, should support the efforts made. The establishment and/or consolidation of national councils for children should be regarded as an excellent way of monitoring implementation of the Convention on the Rights of the Child at the national level.

Denmark

[Original: English]
[8 January 1996]

The Ministry of Justice of Denmark sent the following comments on the optional protocol.

1. According to paragraphs II.1 and IV.1 of the guidelines it appears that the protocol would mandate criminalization of pornography involving persons under the age of 18. Although children in Denmark generally attain majority at the age of 18, it should be noted that the age of consent in sexual matters is 15. Consequently the word "child" in the Danish provision on child pornography (sect. 235 of the Danish Criminal Code) only includes persons under the age of 15.

2. The underlying reason behind the Danish criminalization of child pornography is to protect children from the sexual crimes which are committed during the production of the pornographic material. If the depicted child is 15 years or older and has consented to the act, no sexual crime has been committed.

3. With regard to the definition of child pornography, paragraph II.3 of the guidelines refers, inter alia, to the definition given by the Special Rapporteur on the subject. Under the working definition of the Special Rapporteur (A/49/478, para. 168) child pornography is "the visual or audio depiction of a child for the sexual gratification of the user, and involves the production, distribution and/or use of such material". In the latest report of 20 September 1995 (A/50/456), the Special Rapporteur notes that there is a lack of uniformity in the elements of the crime of child pornography worldwide and mentions as an example that "virtual reality imagery without the use of actual children as models may not be considered pornographic in some countries simply because real children are not used". The Danish prohibition against child pornography includes "photographs, films or similar objects of children". The prohibition does not include "constructed" photographs, etc.

4. As mentioned above, the underlying reason behind the Danish criminalization of child pornography is to protect children from the sexual crimes which are committed during the production of the pornographic material. If the photograph, etc., does not depict a real situation, no sexual crime has been committed. It is the Danish view that a possible optional protocol

similarly should aim at the protection of children from sexual crimes and consequently not include virtual reality pornography which is not the result of a violation of any child.

5. Paragraph IV.6, item 3, contains the following provision:

"States:

...

should prevent the identification of children involved in any such judicial process and respect their right to privacy, in particular

by ensuring the confidentiality of files;"

It does not seem clear what the words "prevent the identification" implies, apart from keeping files confidential. Danish law does not allow anonymous witnesses in criminal trials. Furthermore, under Danish law, criminal files are as a general rule kept confidential. Criminal defendants - and in some cases third parties - do, however, have a very limited possibility of getting access to a criminal file if they can show a legal interest in such access. Denmark assumes that the paragraph quoted above is not to be construed as to mandate the use of anonymous witnesses or to exclude a very limited access to criminal files if warranted by a legal interest. A clarification of the intended scope of the provision might be relevant.

Hashemite Kingdom of Jordan

[Original: Arabic]
[16 November 1995]

1. The comments, views and proposals of the Government of the Hashemite Kingdom of Jordan concerning the draft optional protocol to the Convention on the Rights of the Child on the sale of children, child prostitution and child pornography are as follows.

2. The Government finds that the crucial factor does not lie in the promulgation of new legislation to protect children from exploitation, since this goal can be achieved through the implementation of the existing international standards and rules by establishing an appropriate mechanism to put those standards and rules into practical effect. It feels that the ideal way to do this would be by effectively creating a post of Special Rapporteur on the rights of the child, especially in regions in which the rights of the child are frequently violated, since the presence of a special rapporteur on the rights of the child in those regions would make it possible to monitor and deal with acts involving the sale, prostitution and moral exploitation of children in a more efficient manner.

3. The draft should have referred to other violations against children, which are just as serious as sale and prostitution, namely grave sexual offences such as rape, indecent assault, the traffic in children's organs for purposes of transplantation, and their exploitation in the trade of narcotic drugs and psychotropic substances.

4. The problem of the sale of children and child prostitution seems to be increasing in the poorer developing countries. Consequently, the drafters should have shown the requisite concern for the correlation between poverty and that phenomenon by calling for support for the poorer developing countries and emphasizing the need to promote and intensify international cooperation to reduce hunger, poverty and backwardness with a view to contributing to the elimination of the phenomenon of the sale of children.

5. The States parties should be urged to amend and strengthen their domestic legislation in regard to the protection of children from sale and sexual and moral exploitation in such a way as to make it consistent not only with the international and regional instruments concerning the protection of children but also with the proposed draft protocol.

6. In the light of the above comments, the concept of sexual exploitation should have been broadened to cover acts of sexual violence, such as rape and indecent assault, instead of being confined, as mentioned in article 1 of the draft, to pornography and prostitution. Moreover, this aspect should not be confined solely to sexual exploitation, since children might be exploited for other purposes that are just as serious as sexual exploitation, such as exploitation in the smuggling and distribution of dangerous drugs and narcotic substances. The concept of the "traffic" in children should also be broadened in such a way as to include a ban on the trade in their bodily organs.

7. The Government of Jordan welcomes the fact that the working group on the draft protocol expanded the scope of responsibility for the acts referred to in article 2 of the draft by extending it to cover not only the principal actor but also the instigator, the middleman and anyone who benefits from the offence since in many countries, and particularly in the poorer developing countries, those acts assume the form of organized crime committed with a view to profit. Although these criminal organizations do not usually appear in the picture, a broadening of the scope of responsibility would make it possible to prosecute the groups that engage in those acts in the form of organized crime.

8. The Government also believes that the goal specified in article 3 of the draft can be achieved through bilateral agreements between States, such as extradition agreements, in such a way as to avoid any conflict with the domestic laws of the States parties, since if a national of a particular State commits an offence of this type in the territory of another State he is tried and punished in that State under its own laws in accordance with the principle of territorial sovereignty.

9. During the study of the proposed guidelines for the draft protocol, the Ministry of Justice of the Hashemite Kingdom of Jordan found that the definition of practices involving the sale of and trafficking in children contained a reference to "adoption". In its view, the religious and ideological differences between States should be taken into consideration, since some laws recognize the adoption system while others prohibit adoption.

10. In order to eliminate illicit practices against children, which are assuming serious proportions, Jordan also believes that concern should be shown for the family and the parents in whose care the child is brought up.

This could be done by supporting mother and child programmes, subsidizing poorer families and stimulating public awareness, through education and information, of the dangers of that phenomenon.

11. Jordan supports the working group's recommendation that an international conference should be convened before the year 2000 to evaluate the implementation of the Programme of Action for the Prevention of the Sale of Children, Child Prostitution and Child Pornography, along the lines of the World Summit for Children held at New York in 1990, which adopted the World Declaration on the Survival, Protection and Development of Children, in order to give that problem an international dimension and stimulate worldwide concern. The said international conference should review the Convention on the Rights of the Child, the Hague Convention on Protection of Children, the proposed draft protocol on the sale of children, and all the international and regional instruments concerning the rights of the child. The conference should focus on strengthening bilateral cooperation between States, as well as cooperation at the national and international levels.

12. Finally, the Government finds that the proposed draft protocol is, on the whole, consistent with the provisions of articles 11, 19, 32, 34, 35, 36, 39 and 42 of the Convention on the Rights of the Child and with article 25, paragraph 2, of the Universal Declaration of Human Rights, which states that: "Motherhood and childhood are entitled to special care and assistance. All children, whether born in or out of wedlock, shall enjoy the same social protection." In the event of its adoption and ratification, the draft would constitute a further step towards greater concern for the rights of the child, since the child has now become both an end and a means: an end to which every society must strive to devote its best endeavours, and also a means in so far as such endeavours will bear fruit in the form of a better future since the development of children means the development of the future of the nation as a whole.

13. The universal consensus that children require special care and protection and that there is a need for ongoing international, regional and local efforts to meet the needs of children is one of the outstanding features of this century.

14. In short, Jordan finds that the international community has shown early concern for the rights of the child and the Jordanian legislature has also kept pace with this concern. The Jordanian position is consistent with the international and regional conventions concerning the rights of the child and this protocol constitutes a valuable new addition to the international and national endeavours that are being made in regard to the rights of the child.